
In the Matter of the Compensation of
JAMES D. SMITH, Claimant
Own Motion No. 22-00018OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Philip H Garrow, Claimant Attorneys
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Reviewing Panel: Members Ceja and Curey.

Claimant requests review of a July 28, 2022, Own Motion Notice of Closure that awarded an additional 17 percent (25.5 degrees) scheduled permanent disability for his “post-aggravation rights” new or omitted medical condition (left knee lateral femoral condyle lesion, left knee post-traumatic arthritis).¹ On review, claimant seeks an award of additional permanent disability benefits for his newly accepted conditions. Based on the following reasoning, the Own Motion Notice of Closure’s award is modified.

FINDINGS OF FACT

On February 26, 2003, claimant sustained a compensable left knee injury. (Exs. 1, 6). The SAIF Corporation accepted the claim for a nondisabling left knee strain. (Ex. 6).

On July 3, 2003, claimant underwent an arthroscopic partial medial meniscectomy, arthroscopic debridement of a trochlear and medial femoral condylar lesion, and arthroscopic debridement and microfracture of the lateral femoral condyle lesion. (Ex. 12).

On July 15, 2003, SAIF reclassified the claim as disabling. (Exs. 15, 16).

On October 1, 2003, SAIF additionally accepted posterior horn tear of the medial meniscus and partial ACL tear conditions. (Ex. 22).

¹ Claimant’s February 26, 2003, claim was accepted as nondisabling claim, and was later reclassified as disabling on July 15, 2003. The claim was first closed on August 12, 2004. Thus, claimant’s aggravation rights expired on August 12, 2009. Therefore, when his Own Motion claim for “post-aggravation rights” new/omitted medical conditions (left knee lateral femoral condyle lesion, left knee post-traumatic arthritis) was voluntarily reopened on October 27, 2021, the claim was within our Own Motion jurisdiction. ORS 656.278(1)(b), (5). On July 28, 2022, the SAIF Corporation issued its Own Motion Notice of Closure.

On November 6, 2003, claimant underwent a diagnostic arthroscopy and arthrotomy of the left knee with autologous cultured chondrocyte implantation. (Ex. 23).

On August 12, 2004, a Notice of Closure awarded 5 percent (7.5 degrees) scheduled permanent disability (based on the July 3, 2003, partial medial meniscectomy). (Ex. 30).

On January 26, 2006, claimant underwent an arthroscopic debridement of degenerative changes and chondroplasty of “the grade IV cartilage defect of the lateral femoral condyle.” (Ex. 37).

On October 27, 2021, SAIF issued a Modified Notice of Acceptance for left knee lateral femoral condyle lesion and left knee post-traumatic arthritis and voluntarily reopened claimant’s Own Motion claim for those new or omitted medical conditions. (Exs. 45, 46).

On December 3, 2021, claimant underwent a left total knee arthroplasty. (Ex. 48).

On June 17, 2022, Dr. Hinz opined that the newly accepted new or omitted medical conditions would be medically stationary at the time of a scheduled closing examination on July 5, 2022. (Ex. 53-1).

On July 5, 2022, Dr. Hinz performed the closing examination and found that claimant had full extension of the left knee, and reduced flexion of 115 degrees. (Ex. 54-2).

On July 28, 2022, an Own Motion Notice of Closure increased claimant’s scheduled permanent disability award to 22 percent (33 degrees) (based on a left knee total replacement and left knee range of motion).

On August 16, 2022, claimant requested Board review of the July 28, 2022, closure notice, seeking an increased scheduled permanent disability award, as well as an examination by a medical arbiter.

On September 21, 2022, we issued an Interim Own Motion Order Postponing Action on Review of Carrier Closure. *See James D. Smith*, 74 Van Natta 641 (2022). In that order, we postponed our review of the Own Motion claim closure pending receipt of a medical arbiter’s report. *See id.* at 642.

On January 30, 2023, Dr. Nonweiler completed a medical arbiter examination. Concerning claimant's left knee, the medical arbiter found a "slight" two degree varus deformity, which he considered to be within acceptable limits following claimant's total knee arthroplasty.² Dr. Nonweiler noted the presence of "grade 4 chondromalacia of the lateral femoral condyle" which could be described as extensive degenerative joint disease, though it did not result in consequential varus or valgus deformity. He measured claimant's left knee range of motion as 0 degrees extension and 103 degrees of flexion. Dr. Nonweiler found no muscle strength loss throughout claimant's lower extremities.

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of "post-aggravation rights" new or omitted medical conditions for left knee lateral femoral condyle lesion and left knee post-traumatic arthritis. Such a claim may qualify for payment of additional permanent disability compensation. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004).

We first determine whether ORS 656.278(2)(d) applies to limit any award of permanent disability for the "post-aggravation rights" new or omitted medical conditions. The permanent disability limitation set forth in ORS 656.278(2)(d) applies where there is (1) "additional impairment" to (2) "an injured body part" that has (3) "previously been the basis of a [permanent disability] award." *Cory L. Nielson*, 55 Van Natta 3199, 3203 (2003). If those conditions are satisfied, the Director's standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate "post-aggravation rights" new or omitted medical condition claims. Under such circumstances, we redetermine the claimant's permanent disability pursuant to those standards before application of the limitation in ORS 656.278(2)(d). *Jeffrey L. Heintz*, 59 Van Natta 419 (2007); *Nielsen*, 55 Van Natta at, 3207-08.

Here, regarding claimant's left knee conditions, all three factors are satisfied. Dr. Nonweiler found decreased range of motion in claimant's left knee. Claimant also underwent a partial medial meniscectomy in July 2003 and a total knee arthroplasty in December 2021. (Exs. 12, 48). These impairment findings qualify for an impairment rating. Moreover, claimant's "post-aggravation rights" new or omitted medical conditions (left knee lateral femoral condyle lesion and left knee post-traumatic arthritis) involve the same "injured body part" (the left knee) that was the basis of his previous whole person impairment award. Therefore, the

² Dr. Nonweiler also found five degrees of varus deformity of the right knee.

limitation in ORS 656.278(2)(d) applies. However, before application of the statutory limitation, we redetermine claimant's permanent disability for the left knee pursuant to the Director's standards. *See* OAR 436-035-0007(3); *Nielsen*, 55 Van Natta at 3207.

Claimant's claim was closed by a July 28, 2022, Own Motion Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 22-052 (eff. June 7, 2022). *See* OAR 436-035-0003(1).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Only findings of impairment that are permanent and caused by the accepted condition and its direct medical sequelae may be used to rate impairment. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(1), (2); *Kruhl v. Foremans Cleaners*, 194 Or App 125, 130 (1994).

In this case, claimant requests that the impairment findings of the medical arbiter, Dr. Nonweiler, be used.³ Following our review of the record, we do not find a preponderance of medical evidence demonstrating that different findings should be used. Therefore, the findings of the medical arbiter, Dr. Nonweiler, will be used in conducting our evaluation.

In addition to values for the two left knee surgeries, and range of motion loss, claimant requests an award of impairment for his left knee varus deformity with Grade IV chondromalacia under OAR 436-035-0220(1). After conducting our review, we grant an additional award based on the following permanent impairment values.

Dr. Nonweiler found the following left knee range of motion: 103 degrees flexion and 0 degrees extension. Accordingly, claimant receives the following range of motion values: 16.8 percent for flexion and 0 percent for extension. OAR 436-035-0220(1), (2).⁴ This results in a total value of 16.8 percent for decreased left knee range of motion, which is rounded to 17 percent. OAR 436-035-0011(4).

³ SAIF did not submit a respondent's brief. As such, we have proceeded with our review.

⁴ Because claimant has a history of injury or disease of the right knee, a contralateral comparison is not appropriate. OAR 436-035-0011(3).

Claimant requested a permanent impairment value of 5 percent for his July 2003 partial medial meniscectomy. However, when rating a prosthetic knee replacement, a separate value for previous meniscectomies is not granted. *See* OAR 436-035-0230(5)(e); *Modesto A. Valencia*, 74 Van Natta 475, 480 (2022) (no separate value awarded for previous meniscectomy in addition to surgical impairment for a total knee arthroplasty). As such, claimant is not entitled to a permanent impairment award for the July 2003 left knee meniscectomy.

Claimant receives a surgical impairment value of 20 percent for his December 2021 left total knee arthroplasty, which is an irreversible finding. OAR 436-035-0005(9)(F); OAR 436-035-0230(d).

Dr. Nonweiler diagnosed grade IV chondromalacia of the lateral femoral condyle of the left knee. Additionally, he noted that claimant had a “slight varus deformity” of two degrees on the left knee. Two degrees of left knee varus deformity is less than the ratable amount of varus deformity under OAR 436-035-0230(4)(a) (*i.e.*, varus deformity of greater than 15 degrees). However, because there is a diagnosis of grade IV chondromalacia and the presence of left knee varus deformity of less than 15 degrees, 5 percent permanent impairment of the leg is awardable under OAR 436-035-0230(11)(b). *See Wayne S. Devore*, 67 Van Natta 1112, 1116 (2015); *Joann L. Goodsell*, 66 Van Natta 642, 646 (2014). Thus, claimant is entitled to an additional 5 percent permanent impairment of the left leg.

There are no other ratable permanent impairment findings.

Therefore, we combine claimant’s left leg (knee) impairment values as follows: 20 percent (total knee arthroplasty) combined with 17 percent (range of motion) is 34 percent; 34 percent combined with 5 percent (grade IV chondromalacia with varus deformity) results in a total of 37 percent impairment (55.5 degrees). OAR 436-035-0011(6).

As discussed above, the limitation in ORS 656.278(2)(d) applies. Therefore, claimant is entitled to additional permanent disability only to the extent that the current permanent disability rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant’s prior 5 percent (7.5 degrees) scheduled PPD award for the loss of use or function of the left leg (knee) is less than his current 37 percent (55.5 degrees) scheduled PPD rating, which leaves a remainder of 32 percent (48 degrees). The July 28, 2022, Own Motion Notice of Closure awarded 22 percent (33 degrees) scheduled PPD

for the left leg (knee). (Ex. 55). Accordingly, we modify the July 28, 2022, Own Motion Notice of Closure to award an additional 10 percent (15 degrees) scheduled PPD for loss of use or function of the left leg (knee).⁵

Because our decision results in an increased scheduled PPD award, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased scheduled PPD compensation created by this order (*i.e.*, the 10 percent (15 degrees) scheduled PPD award for the left leg (knee) granted by this order), payable directly to claimant's counsel. ORS 656.386(5); OAR 438-015-0040(1); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on August 4, 2023

⁵ Claimant's total award to date is 37 percent (55.5 degrees) scheduled PPD for the loss of use or function of the left leg (knee).